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ALEXANDER L. STEVAS,
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No. 81-1809

IN THE SUPREME COURT OF THE

UNITED STATES

STATE OF ALABAMA,

PETITIONER

VS.

EDWARD HORSLEY,

RESPONDENT

MEMORANDUM BRIEF IN OPPOSITION TO MOTION TO DISMISS AND IN REPLY TO SUPPLEMENTAL RESPONSE TO PETITION FOR CERTIORARI

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TABLE OF CONTENTS

	page
TABLE OF AUTHORITIES	ii
MEMORANDUM BRIEF IN OPPOSITION TO THE MOTION TO DISMISS AND IN REPLY TO SUPPLEMENTAL RESPONSE TO PETITION FOR CERTIORARI	1
CERTIFICATE OF SERVICE	5

TABLE OF AUTHORITIES

	page
California v. Stewart, 384 U.S. 436.	3
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469.	1
Mills v. Alabama, 384 U.S. 214	3
O'dell v. Espinoza, _____ U.S. _____, 50 USLW 4477 (May 3, 1982).	1

MEMORANDUM BRIEF IN OPPOSITION TO MOTION TO DISMISS AND IN REPLY TO SUPPLEMENTAL RESPONSE TO PETITION FOR CERTIORARI

The Respondent has filed a Motion to Dismiss and a Supplemental Response to Petition for Certiorari contending that the State of Alabama's Petition for Certiorari seeks review of a state court decision which is not "final" within the meaning of 28 USC §1257, per the decision in O'dell v. Espinoza, _____ US_____, 50 USLW 4477 (May 3, 1982).

The Petitioner submits that Respondent's reliance on O'dell v. Espinoza is unfounded in the facts of the case at bar.

The opinion in O'dell v. Espinoza cites the case of Cox Broadcasting Corp. v. Cohn, 420 US 469, as delineating those situations in which finality as to the federal issue has been found by this Honorable Court despite the ordering of further proceedings in the lower state courts. In Cox, supra, one

such exception is set forth as existent in cases where the federal claim is finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issues cannot be had, whatever the ultimate outcome of the case. In that class of cases, if the petitioner prevails on the merits, the federal issue would be mooted; if he were to lose on the merits, the governing state law would not permit him again to present his federal claims for review.

Petitioner submits that the facts of the case sub judice bring it within the jurisdictional review of this Honorable Court. If the State of Alabama loses on the merits at a retrial of this matter, it would have no appeal. The order of the Alabama Supreme Court is "final" as to the federal issue and therefore ripe for review by this Honorable Court.

To support this contention the Petitioner would rely on the case of

California v. Stewart, 384 U.S. 436. In that case the judgement in the state court directed retrial of the case . In footnote 71 of its opinion this Court held that since the facts were such that if the respondent were successful in obtaining an acquittal on retrial the State would have no appeal, the judgement of the lower state court was "final" as to the federal issue even though a retrial was ordered. In Mills v. Alabama, 384 U.S. 214, this Court found finality in a criminal case wherein the Alabama Supreme Court decided the constitutionality of a statute but also ordered retrial of the defendant.

Petitioner submits that the facts of the case at bar place it within the class of cases reviewable by this Court as "final" judgement of the highest state court. The facts of O'dell v. Espinoza are so dissimilar from those at bar that the bar from review enunciated therein is inapplicable. The judgement is "final" within the meaning

of 28 U.S.C. §1257 and proper for review by this Honorable Court.

Respectfully submitted,

CHARLES A. GRADDICK
ATTORNEY GENERAL FOR THE
STATE OF ALABAMA
BY:

_____
J. ANTHONY McLAIN
SPEC. ASST. ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I hereby certify that on this date I did serve a copy of the foregoing on the attorney for the Respondent:

Honorable Jack Drake
Drake, Knowles, & Pierce
Post Office Box 86
Tuscaloosa, AL 35402

by placing said copy in the United States Mail with postage prepaid and correctly addressed.

Done this the _____ day of May, 1982.

_____

J. ANTHONY McLAIN
SPECIAL ASST. ATTOR. GENERAL